

VZCZCXYZ0014
PP RUEHWEB

DE RUEHNR #2449/01 1631318
ZNR UUUUU ZZH
P 121318Z JUN 07
FM AMEMBASSY NAIROBI
TO RUEHC/SECSTATE WASHDC PRIORITY 0308
INFO RUEHRC/USDA FAS WASHDC 1516
RUEHDS/AMEMBASSY ADDIS ABABA 9365
RUEHAE/AMEMBASSY ASMARA 4954
RUEHJB/AMEMBASSY BUJUMBURA 0145
RUEHDR/AMEMBASSY DAR ES SALAAM 5326
RUEHDJ/AMEMBASSY DJIBOUTI 4741
RUEHKH/AMEMBASSY KHARTOUM 1225
RUEHLGB/AMEMBASSY KIGALI 4834
RUEHLO/AMEMBASSY LONDON 2290
RUEHFR/AMEMBASSY PARIS 2239
RUEHRO/AMEMBASSY ROME 5156

UNCLAS NAIROBI 002449

SIPDIS

SENSITIVE
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E.O. 12958: N/A
TAGS: [ECON](#) [EAGR](#) [EINV](#) [EAID](#) [ETRD](#) [PGOV](#) [KCOR](#) [KE](#)
SUBJECT: LAND REFORM IN KENYA: TRYING TO RIGHT
PAST WRONGS BUT AT WHAT PRICE FOR THE FUTURE?

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¶11. (SBU) SUMMARY: The combination of an ever-expanding population, settler legacy, poverty, corruption, elite impunity, and an inadequate land law system make the ownership, tenure, and use of land one of the most volatile questions in Kenya today and one of the most serious impediments to economic development. Ethnic clashes; slums and squatters; poverty and a lack of available capital; corruption and political malfeasance -- all either reflect or are reflected in the problems arising from KenyaQs land rights and distribution regime. The proposed new National Land Policy makes an attempt to solve some of these problems, but if translated literally into law, could have gravely detrimental unintended consequences for KenyaQs economy. END SUMMARY.

Demographic Pressures and Badly Skewed Distribution

¶12. (U) KenyaQs land mass can be roughly divided into three regions: fertile agricultural; arid and semi-arid (ASAL); and coastal. The fertile agricultural land (roughly the central and south-east parts of the country) comprises about 17% of KenyaQs surface area and supports some 75% of KenyaQs 36 million people; it is the epicenter of KenyaQs agriculture-based economy. About 50% of this rich agricultural land is owned by less than 20% of the population. Nationwide, it is estimated that only about 18% of the population owns more than 1.5 acres (approximately 13% of Kenyans are landless and about 69% own one and half acres or less). Within this select 18%, it is widely believed that there are a fortunate few who own most of KenyaQs valuable property. While no one knows exactly who they are and what they own, a group of former and current politicians and power brokers, together with the remnants of the white settlers and a few well-connected businessmen and farmers, collectively own hundreds of thousands and maybe even millions of acres of land. Tens of thousands of these acres were bought legally, albeit with the taint of inappropriate political influence. Thousands more, however, were acquired illegally, often through programs putatively designed to distribute land to squatters and the landless. To add insult to injury, a significant portion of these large land holdings are not

being developed or used; they are being held as speculative investments by absentee landlords.

¶13. (U) For the average Kenyan, this situation is simply galling. Land, and the appertaining agricultural, water, and grazing rights, are not only the greatest source of wealth accessible to them, but are also of enormous cultural importance. For most Kenyans, the possession of land, the raising of crops and livestock, and the obtaining of mortgages to raise capital for further development is the only route out of poverty. Land ownership is highly valued as a status marker for most of Kenya's ethnic groups (cattle ownership, which necessitates grazing land, serves the same purpose for pastoralists). As the population increases, owning enough land to prosper, or even to survive, is becoming an increasingly difficult proposition. The population of Kenya has increased almost 400% in the four decades since independence while the amount of land has remained the same. Even under the best land system, demographic pressure alone would make land rights a very serious issue. Kenya's land system is far from the best, and the lack of available land is exacerbated by chronic uncertainty over who owns what land and perceived injustices, both historic and current. This potent mix retards development, contributes to widespread poverty, and creates such frustration and anger that violent inter-communal clashes over land are common, especially in election years.

A History Rife With Unfairness and Illegality

¶14. (U) The history of Kenya's land problems is rather complicated. In broad strokes, from the late 1880s to the mid-1950s, the British colonial government took overt control of about 50% percent of the prime agricultural land (mostly in the middle of the country) and large parts of the coast. In some instances the land was simply taken; in others, it was ceded to the British government by treaties of questionable fairness, often by leaders who had no authority over the land they ceded. Much of this land was either sold or leased to white settlers and became famously known as the White Highlands. Estimates of how many thousands of Kenya's people were displaced by this process vary; it is certain, however, that millions of acres of high-quality land came under direct British colonial control and use.

¶15. (U) The rest of Kenya was largely Native land, which was held in trust by the British government for the benefit of its inhabitants and was not as closely controlled by the colonial government. Most of Kenya's ASAL regions and much of the good agricultural land not occupied by the settlers fell under this category. Finally, some areas were designated as Crown land, which reserved the land for the use of the British Government. Land one mile on either side of the Kenya-Uganda railway, for example, was Crown land, as were large parts of Kenya's coast, forests and riparian areas. Note: Legally, the Native lands were also Crown lands and thus their inhabitants could be alienated from their lands at any time. In practice, this did not happen with great frequency, as much of the land was ASAL and thus of little value to the settlers. End note.

¶16. (U) In the lead-up to independence, the British government attempted to place land back in the hands of indigenous Kenyans through a series of settlement and repurchasing programs. The programs met with mixed success; while many thousands of families were resettled on the land they had lost, the Kenyans who had become politically powerful and/or wealthy during the colonial period were able to purchase vast tracts of the best land, leaving much of the population with the left-overs or nothing at all. Note: During the 1950s Mau Mau insurrection, many thousands of Kenyans, primarily of the

Kikuyu tribe, lost their lands. While some of them were resettled, many more were not. End note. At independence in 1963, the newly-empowered Government of Kenya (GOK) decreed that whatever land rights were in existence at the time would be confirmed and upheld.

Actors change, but the colonial status quo remains

¶ 7. (SBU) The decision by the post-independence GOK to maintain the colonial period status quo for land rights at independence was, in essence, a perpetuation of the land rights system used by the British. The land purchased from the settlers or redistributed by the British government became QprivateQ land. The land the British had declared QcrownQ land became QgovernmentQ land. The President, through the Commissioner of Lands, took on the powers of the colonial governor to allocate that land as he saw fit, although ostensibly only for Qpublic interest.Q Most QnativeQ land became QtrustQ land, governed by county councils in trust for the inhabitants. Many of the problems of the colonial period also persisted, if with different actors. QPrivateQ land was, and still is, largely owned by the rich and powerful and obtained through a combination of (often ill-gotten) wealth, luck, and influence peddling. Thousands of Kenyans were, and still are, landless squatters.

¶ 8. (SBU) During the 1980s and 1990s, the GOK badly abused its right to dispose of QgovernmentQ land, selling, leasing, or simply giving large blocks of it to foreign investors, companies, government officials, or well-connected businessmen and farmers, often to buy political influence or acquiescence. QTrustQ land was also abused extensively during the same period, with allocations to those who had no connection to the communities occupying

the land other than corrupt relationships with the county councils. One of the most authoritative studies done on land tenure in Kenya, the Judicial Commission of Inquiry on Illegal and Irregular Allocation of Public Land (QNdungQu ReportQ), estimates that 90% of the land titles issued in the last twenty years have been either illegal or the result of influence-peddling. Other estimates state that of the 1.5 million registered titles in Kenya, fully 500,000 are illegal.

Coast Province Is Particularly Problematic

¶ 9. (SBU) While most of KenyaQs ethnic groups have suffered land deprivations at the hands of the British, the GOK, or both, the inhabitants of Coast Province, about half of whom are Muslim, have arguably suffered the most. Their problems date back to 1888, when the Sultan of Zanzibar (who at the time controlled much of the East Africa coast) ceded to the Imperial British East Africa Company virtually all rights to land in a ten-mile wide strip along the entire coast of Kenya. (Note: The strip actually went from Tanzania to Somalia. End note.) In 1908, the colonial government passed a law stating that all land in the ten-mile strip would become QcrownQ land unless the inhabitants could assert their rights to ownership during a six-month window. Most coastal inhabitants either could not produce the requisite paperwork, or did not even know of the requirement. Accordingly, when the window closed almost all of them lost their rights to their land. At independence, virtually none of the land became QprivateQ land under the ownership of the indigenous people. The vast majority became either QgovernmentQ land or QprivateQ land under the ownership of foreign investors or wealthy Kenyans from other parts of the country.

¶ 10. (SBU) Perhaps as nowhere else in Kenya, the GOK abused its authority over QpublicQ land in Coast Province. In just one example, six salt companies were given 10,465

hectares of QpublicQ land with no regard for the welfare of those living on the land. According to GOK estimates, 11.3% of the residents of Coast Province have no legal rights to the land they have occupied, in some cases, for generations. Other estimates put the number as high as 80%.

So, Too, Are The Claims of the Masai

¶11. (SBU) One of the other ethnic communities with a particularly acute land claim is the Masai. In the years before the British arrived, the pastoralist Masai controlled as much as a third of modern Kenya and numbered perhaps 400,000. Note: The Masai had acquired control of these enormous tracts of land by dispossessing other Kenyan communities, especially the Kamba. End note. In the last few years of the 19th century, however, they lost perhaps 90% of their population to famine after a series of diseases decimated their herds. The British, seizing on this weakness, convinced the Masai to enter into two treaties, one in 1904 and one in 1911, which gave the British government huge tracts of land in central Kenya under what was supposed to be a 99-year lease. Note: These lands formed the lionQs share of the QWhite Highlands.Q End note. However, during the colonial period and after independence, that land was either re-leased or sold outright. When the original 99 years expired, none of the land was returned to the Masai. The population of KenyaQs Masai is now somewhere around 500,000 and more and more would-be Masai herders have no land for their cattle. Illegal land dealings within the Masai community itself have caused a large part of their problems, but their claims to the land taken from them by the British and the GOK have become a lodestone for those seeking to reform KenyaQs land system.

Previous Attempts At Reform Have Gone Nowhere

¶12. (SBU) The GOK has made several efforts to examine, if not address, the inequities and illegalities present in KenyaQs confused land system. In 1972, the GOK set up a Special Committee to assess land problems in Coast Province. In 2002, it commissioned a special report on existing land law and tenure. In 2004, the NdungQu Report, which concerned the illegal or irregular allocation of QpublicQ lands, was published. The NdungQu Report in particular caused quite a stir, as it stated Q[t]he powers vested in the President to make grants of [government land] have been grossly abused over the years by both the President and successive Commissioners of Lands and their deputies.Q The Report also pointed to local authorities as being complicit in the Qunbridled plundering of public lands.Q

13 (SBU) The NdungQu Report was widely praised and was adopted in full by the GOK Cabinet. However, very little has been done to act on any of the problems it cataloged or the recommendations it made. In the first two years after the Report was published, a paltry 133 titles of illegally or irregularly allocated public land were given back to the GOK. While there have been some unsubstantiated rumors that the Ministry of Lands has recently begun to accelerate its implementation of the Report, notably canceling a rumored 600 illegal titles, it is not doing so publicly.

The New Land Policy Means Well...

¶14. (SBU) The proposed National Land Policy (NLP) is the most recent of the GOKQs land reform efforts. It is the penultimate step in a process that began in 2004. The GOK, working with a group of donors and NGOs, has created a

document designed to not only reform Kenya's land laws, but also to substantially reorient the priorities of Kenya's land system. It is at its heart a policy designed to help the poor and vulnerable and to end violent conflict over land, all laudable goals. The donor group describes the NLP as "pro-poor," focusing more on equity and recognition of a basic right to land use than on individual ownership rights.

¶15. (U) In broad strokes, the NLP is designed to fix the following ills: insecurity of tenure, skewed distribution, widespread gender-based and class-based discrimination, and historical injustices. It would do so by amending or repealing virtually every land law currently on the books and replacing them with a single set of legislation, enforced by a new governmental entity, the National Land Commission. The Commission would have broad-ranging powers to manage, oversee, redistribute, and determine the use of land in Kenya. It would also establish tribunals to right historical wrongs and injustices dating as far back as 1895. Note: 1895 seems to have been chosen because that date is often cited as the inception of the colonial period. Thus pre-colonial land disputes between indigenous communities would not be heard by the tribunals. End note.

But Could Have Serious, Harmful Unintended Consequences

¶16. (SBU) The proposed NLP is a bold document, one which borders on the utopian. It can be argued that such a radical shake-up is necessary to root out the illegalities and gross inequalities in the current system; however, the NLP has a number of provisions which could have highly detrimental effects on the investment climate and the Kenyan economy. Take, for example, the proposal to repeal the principal of absolute sanctity of first registration of title to land. In essence, this proposal would allow any registered land title to be reexamined and litigated without the need to show it was obtained through fraud or other illegal means. While the proposal's intent is to provide a means to overcome illegal titles, it would also dramatically weaken the security and confidence of every

landowner, and every bank, in the land rights they hold or use as collateral. The effect on the availability and value of mortgages, and thus on the ability of any landowner to raise capital, could be dire.

¶17. (SBU) Another provision (mentioned above) would create legal and administrative mechanisms to resolve historical land injustices arising as early as 1895. Note: Some claim that non-Kenyan NGOs, particularly ActionAID, are responsible for this particular item in their efforts to help the Masai. End note. Historical injustices is a slippery term at best, and considering that land issues in Kenya tend to be tied to often-volatile ethnic tensions, attempts to resolve the injustices in favor of one ethnic group over another could be disastrous. Another provision states that non-Kenyans would no longer be allowed to own property in Kenya: foreigners would be limited to 99-year leases. Those foreigners who own land, or who have leases longer than 99 years, would see their rights reduced to 99-year leases with no obvious means of reimbursement. Yet another troubling provision would require the GOK to compulsorily acquire all land on which mineral resources have been discovered before allocating such land to interested investors... While the intent is to prevent local communities from being exploited, the GOK itself has a badly checkered history concerning corruption and misuse of resources.

Private Sector Cries Foul, And The Elite Will Not Like It

¶18. (SBU) The NLP was created with virtually no input from the wealthier side of the Kenyan private sector, including

its landowners and companies, or from the banks. Representatives from this section of the private sector have stated that they either did not know of the various forums and symposiums that were called to discuss the NLP, or were rebuffed when they attempted to give their views. Many of those involved in the NLP process, however, told Econoff that these representatives simply chose not to be involved. Whatever the case, the landowners have recently started to make their voices and many criticisms heard.

¶19. (SBU) Furthermore, if taken literally, the proposals the NLP makes would require a serious investigation and probable reallocation of the lands held by the rich and powerful of Kenya, including the three families widely rumored to be amongst the country's biggest landowners: the Kenyattas, of the first President, Jomo Kenyatta, who are said to own approximately 500,000 acres; the Mois, of the second president, Daniel arap Moi, who are said to own about 114,000 acres; and the Kibakis, of the third and current president, Mwai Kibaki, who are rumored to own at least 44,000 acres. Note: Some estimate that the families of Kenya's first three presidents collectively own as much as 11.5 percent of Kenya. End note. The Kenyan elite are unlikely to allow this to happen. Furthermore, most scholars believe that enacting the NLP would require a constitutional amendment and the repeal or amendment of 17 different pieces of legislation. Based on prior history, the Kenyan Parliament would be tied up for years doing nothing else. Finally, many of the provisions of the NLP were also in the draft Constitution that was rejected in a national referendum in 2005. While they have been repackaged as part of the NLP, they still carry the taint of public rejection.

Land Reform Is Needed, But The NLP Is Not The Answer

¶20. (SBU) COMMENT: The likelihood that the NLP will become law in its current form is small. It is something of a mish-mash of desires and goals from a widely disparate group of concerned parties. Parts of the NLP seem to be an attempt by a small and radical group to up-end land rights in Kenya in favor of a redistributionist scheme which has a quaintly utopian flavor; the more concerned landowners believe it could actually result in a Zimbabwe-style

meltdown. The donors say that much of the NLP is an aspirational document that they hope will be crucial to Kenya overcoming its ever-worsening land shortage; they assume that the deeply troubling legal problems it contains will be worked out through the legislative process. There are provisions which seem to be a genuine attempt on the part of the GOK to reform the Kenyan land system; there are others that are so unworkable and unrealistic that they smack of a cynical attempt by the current administration to win votes by pandering to the poor in an election year.

¶21. (SBU) There is no great reason for hope that Kenya's land system will change soon, despite the great need to do so; past attempts to right land wrongs in Kenya have been almost completely ignored by the powers that be. Even if the GOK were to decide to take real steps to fix Kenya's thorny land problems, it must be well aware that as history elsewhere has shown, attempting to make right historical wrongs is fraught with risk and danger. While the public discussion engendered by the NLP is a step in the right direction, it seems that for the foreseeable future, talk will be the NLP's only constructive contribution to Kenya's land problems. END COMMENT.